SUPREME COURT, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975.

No. 75-1145

ROOSEVELT McKITTY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Petitioner, Roosevelt McKitty, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above case on January 14, 1976.

Opinion Below

The opinion of the Circuit Court of Appeals appears in the appendix annexed hereto, is as yet unreported.

Jurisdiction

The judgment of the Court of Appeals was entered on January 14, 1976. The jurisdiction of this court is invoked under 28 U.S.C. 1254 (1). (See Appendix A)

Question Presented

Whether the evidence established that petitioner was entrapped as a matter of law on the crimes charged in the indictments.

Statutory Provisions Involved

Statutory provisions involved are 21 U.S.C. Section 841 (a) (1) (Count I) and 21 U.S.C. Sections 952 (a) (2) 960 and 18 U.S.C. Section 2 (Count II) and 21 U.S.C. Section 841 (a) (1) and 18 U.S.C. Section 2. (Count III) (See Appendix B)

Statement of the Case

A three count indictment was filed against petitioner and Isaac B. Bravo, charging each with conspiracy to possess marijuana with intent to distribute it in violation of 21 U.S.C. Sections 841 (a) (1) (Count I) importing marijuana in violation of 21 U.S.C. Section 952 (a) (2), 960 and 18 U.S.C. Section 2 (Count II) and possessing marijuana with intent to distribute it in violation of 21 U.S.C. Section 841 (a) (1) and 18 U.S.C. Section 2 (Count III).

The jury returned guilty verdicts against Petitioner on each count and against Bravo on Count III. Petitioner

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was sentenced for three concurrent five year custodial terms, each to be followed by a two year special parole term. On appeal the Circuit Court of Appeals affirmed the judgment of conviction against the Petitioner.

Special Agent Crane testified he met Petitioner for the first time at the Linden Airport in Linden, New Jersey on August 17, 1974, at about 1:00 P.M. He was introduced to Petitioner by Ed Keegan. He had a short conversation with Petitioner and stated "Mr. McKitty was not particularly interested in talking to me directly. I don't think he anticipated meeting me. I was introduced to McKitty as someone who could accomplish circumventing customs at Newark Airport." (1Tr. 36-6 to 13). Agent Crane further stated that he had accompanied Keegan to the airport "with the intention and purpose of meeting Mr. McKitty to talk to him about a possible importation of marijuana" (1Tr. 35-5 to 7). Agent Crane also indicated that there was a discussion of the amount of financial compensation that he was to receive for performing his service. In response to the question on direct examination:

> "Was there any discussion on how these goods should be shipped?"

Agent Crane answered:

> "Yes, there was. I told him that I think the easiest way to do it would be if they were shipped as his personal effects." (1Tr. 37-17 to 21).

Agent Crane had further contact with petitioner on the evening of August 22, 1974 when he met with the defendant at the Broker Restaurant in Newark. The meeting had been arranged by Ed Keegan (1Tr. 41-12 to 16).

During the course of the meeting, petitioner told him that a shipment was in fact due to arrive at Newark Airport at 7:00 P.M. that evening (1Tr. 43-3 to 6). Crane responded by requesting that McKitty supply him with an airway bill number on the shipment. According to Crane, McKitty responded that he did not have the number, but said that if Crane "would call him the next morning, that he would supply it" (1Tr. 44-2 to 9). At this time, Agent Crane went back to his office and met with other law enforcement agents. He then went to Newark Airport and located the shipment in question, which was addressed to a Mr. George Williams, in Newark, New Jersey (1Tr. 53-20). At this time, the Government agents opened the crate (G-1) and verified the fact that there appeared to be marijuana inside (1Tr. 55-11 to 13).

Agent Crane testified that after inspecting the crate with the contraband marijuana, he met with Customs agents and other law enforcement personnel to establish plans for delivery of the crate to the Shell station which had been picked as his rendezvous point with petitioner (2Tr. 6-2 to 7). The crate was then put into a blue van and was taken to a bowling alley parking lot near the Shell station rendezvous point. A surveillance system was also set up around the Shell station (2Tr. 7-5 to 21). Agent Crane then went to the Shell station to meet petitioner and to see if everything was in order. Petitioner indicated at that time that everything was all right. However, according to Agent Crane, Petitioner's truck had not yet arrived. Eventually however, the red van did arrive (2Tr. 26-2), driven by a person identified by Agent Crane as Isaac B. Bravo (2Tr. 27-15 to 16).

At this point, one of the officers asked Bravo to position his van next to the van containing the crate so that the rear door of the vans were facing each other (2Tr. 28-5).

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Agent Crane also testified on direct examination that Bravo then "took a screwdriver from his van, pried the crate open, looked inside, closed the crate again, banged the nails back down with a screwdriver and put the screwdriver back in the truck." (2Tr. 29-1 to 4). Agent Crane indicated that at this juncture Bravo tried to move the crate, but that he was stopped by Crane who insisted upon having his money before the crate was transferred from one van to another. In response to Crane's requst, Bravo went to fetch McKitty (2Tr. 30-25). McKitty then returned with the money and along with Agent Crane helped Bravo transfer the crate. Once the truck was loaded, Bravo drove away. Eventually, after the petitioner had been apprehended, Crane took what he considered to be a representative sample of contraband from the crate and sent it to the laboratory for analysis (2Tr. 42-11 to 15).

On cross-examination, Agent Crane conceded that he had known Ed Keegan prior to his August 17th meeting with the petitioner McKitty (2Tr. 45-9). Agent Crane also indicated that Keegan had been referred to the D.E.A. by the Office of the Union County Prosecutor. Agent Crane indicated that he and Special Agent Kennedy, Crane's Group Supervisor, had met with Keegan in the week prior to August 17th for about 45 minutes. At this time Keegan had indicated that he had information concerning narcotics importation (2Tr. 55-1 to 11). Crane also stated that he and Special Agent Kennedy met with Keegan at the Coachman Inn immediately prior to preceeding to the airport to meet with McKitty on the 17th (2Tr. 64-31).

Agent Crane left McKitty on August 17th with the understanding that he and McKitty would contact each other through Ed. Keegan (2Tr. 86-21 to 25). Agent Crane stated that a thorough investigation of Mr. McKitty's

background indicated that he had never been involved in any kind of similar operation (2Tr. 106-2 to 12).

Officer Joseph Dugan of the Roselle Police Department testified that he had been assigned on the morning of August 23rd to follow petitioner. Pursuant to his instructions, he followed McKitty into Patty's Tavern in Elizabeth (3Tr. 180-24). At approximately 9:20 A.M., a phone rang in a both in the bar and the bartender called for "Rocky." Petitioner identified himself as Rocky and answered the phone (3Tr. 181-4 to 9). Shortly after receiving this call McKitty made another call and talked on the telephone for about 15 minutes. Thereafter, he went outside of the tavern and talked to a man in a Thunderbird. After departing the tavern, Dugan testified that he briefly followed McKitty. However, he eventually returned to the vicinity of Patty's Tavern where he managed to find a vantage point from which he could observe the entire transaction at the Shell station (3Tr. 185-2 to 16).

Petitioner testified he was introduced to Agent Crane through Ed Keegan (3Tr. 236-15). He had met Keegan through a person named Gerald Williams (3Tr. 239-15 to 21). Gerald Williams had called McKitty on behalf of Keegan asked him to supply a source for marijuana, to which request McKitty responded "no" (3Tr. 240-3 to 8). Williams indicated to McKitty that Keegan was on the verge of bankruptcy and needed the money to save his business. According to McKitty's testimony, Williams called him more than once in an attempt to persuade McKitty to cooperate (3Tr. 243-14 to 16). McKitty repeatedly refused (3Tr. 243-20). Eventually Williams introduced McKitty to a man named Joe Taylor, who was represented to petitioner as Keegan's broker (3Tr. 244-14). Taylor also emphasized the extent of Keegan's need

for money (3Tr. 245-1 to 3). Eventually McKitty did meet Keegan and Keegan attempted to introduce McKitty to Chuck who worked for Eastern Airlines (3Tr. 258-1 to 16). McKitty objected to having an interview take place. According to McKitty, Keegan brought "Chuck" to McKitty's hotel room where Chuck said, "well Rocky, I'm Chuck. I work at Eastern Airlines. I am responsible for the cargo department. Mr. Keegan told me you want to import some marijuana" (3Tr. 258-22 to 25).

McKitty also testified that Keegan had told him that he and his pilot Sam had been engaged in similar enterprises for a while (4Tr. 14-8 to 9). McKitty testified that during the afternoon of the transaction, he spent virtually the entire day looking for Mr. Keegan because he thought of this essentially as Keegan's transaction(4Tr. 39).

Bravo testified that McKitty called on August 22nd and asked him to rent a van (4Tr. 76-4 to 8). McKitty asked him to have it available and called to take it to the Shell station (4Tr. 79-24). On the question of his knowledge of the contents of the box, Bravo testified that he did not know what was in it (4Tr. 84-4 to 13). Bravo also testified that McKitty told him that after the transaction, he was to take the van and park it near his home, which he did (4Tr. 82-18 to 25).

Reasons for Granting the Writ

The Court of Appeals has rendered a decision in conflict with the applicable decisions of this Court.

"To determine whether entrapment has been established, a line must be drawn between the trap for the unwary

innocent and the trap for the unwary criminal". *Sherman* v. *United States,* 356 U.S. 369, 372 (1958). As stated in *United States* v. *Russell,* 411 U. S. 429 (1973) the thrust of the entrapment defense in *Sorrells* v. *United States,* 287 U. S. 441 (1932) was held by Chief Justice Hughes, "to focus on the intent or predisposition of the defendant to commit the crime".

The problem presented by entrapment has had a wealth of consideration by the courts, first emphasized comprehensively in the classic case of *Sorrells* v. *United States,* supra. The views of Chief Justice Hughes, speaking for the majority and Justice Roberts, speaking for the minority, can be summarized as follows: The difference in the views of the majority and the concurring opinions is that in the former the inquiry focuses on the predisposition of the defendant, whereas in the latter, the inquiry focuses on whether a Government official instigated the crime."

Ordinarily, entrapment is a question of fact, and in jury cases must be submitted to the jury. In the *Sorrells* case, supra, the court remanded the case to the District Court for retrial with instructions to submit the issue to the jury. It may become a question of law when the facts are undisputed. *Sherman* v. *United States,* 356 U.S. 369 (1958).

It is the contention of the petitioner that entrapment existed as a matter of law and that the indictment against him should have been dismissed and petitioner acquitted at the end of the Government's case.

The reasonable inferences drawn from the testimony of the Government's witnesses, resolving disputed points in favor of the Government, support the contention that the crime charged in the three counts on the indictment originated with Ed Keegan and was the result of the "crea-

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tive activity" of Keegan and Special Agent Crane of the Drug Enforcement Administration. Agent Crane testified that Ed Keegan was a resource of the Union County Prosecutor's office who had admitted to having previously engaged in plans "to bring something in from Jamaica" (2Tr. 53-1 to 5). Crane and his Supervisor, Special Agent Kennedy met with Keegan prior to August 17th to discuss his potential involvement in the efforts to apprehend petitioner. On the day of his first meeting with petitioner, Crane and Special Agent Kennedy had met with Keegan before the meeting with petitioner to discuss in greater detail the upcoming operation. Crane testified that it was Keegan who set up the meeting on August 17th and the subsequent meeting on August 22 between the Agent and petitioner. When Crane left petitioner on the 17th, it was understood that Crane and petitioner would contact each other through Keegan. It, therefore, seems clear that the agreement, plans and effectuation of the criminal act of importing marijuana originated with Keegan and Agent Crane, acting on behalf of the Government. Both the *Sherman* and *Sorrell* decisions support the proposition that the acts of the informer or other "special employee" may be imputed to the Government for the purposes of an entrapment analysis.

It is also submitted that the acts for which the petitioner was convicted under Counts II and III were the result of creative activity on the parts of Agent Crane and Ed Keegan. Agent Crane testified that the crate containing the marijuana had already been seized and was in the custody of law enforcement officers at the time it was taken to the Shell gas station by these very same agents in order to be transferred to petitioner. The ease with which the agents seized the shipment is at least in part attributable to the fact that the goods were shipped as personal effects, pursuant to a suggestion made by

Agent Crane to petitioner as the most effective method for shipping contraband, such as marijuana. The conversation that took place at the August 17th meeting between petitioner and Agent Crane is indicative of the extent to which the particulars of this operation were supplied by agents of the Government.

Another particular which was important to the operation was the supplying of the airway bill number. The night before the shipment was to have arrived, Crane asked petitioner for the airway bill number so that he might more easily locate the shipment. Petitioner indicated that he did not have the number, but that he would be able to supply it to Crane if Crane would call him the following morning (1Tr. 35-5 to 7). The evidence that petitioner did not have the crucial way-bill number, but had to obtain it from someone else was reinforced by Officer Joseph Dugan of the Roselle Police Department. Dugan testified that he had been assigned to follow petitioner on the morning of August 23rd. He followed petitioner to a tavern in Elizabeth where petitioner received a phone call at 9:20 a.m. Shortly thereafter petitioner made another call at the same time that Agent Crane testified that he had spoken to petitioner. This testimony is particularly interesting when combined with the testimony of petitioner, who indicated that the received the way-bill number from one of Keegan's henchmen.

The Government witness admitted that it delivered the marijuana to petitioner and then charged him with possion and intent to distribute. In effect, the Government supplied the defendant with the contraband which defendant was charged with possessing. This behavior clearly violates the spirit of those policies which brought about the entrapment defense.

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Agent Crane conceded that his investigation had not revealed any evidence of previous activities in marijuana, possession or sale, on the part of petitioner (2Tr. 106-2 to 12). This admission had a two-fold significance. It is, in and of itself, evidence which would support the inference that petitioner was not predisposed to commit the crimes charged and had no history of involvement with these kinds of crimes. It is also important in that it suggests the reluctance petitioner displayed to talk to Agent Crane (1Tr. 36-6) was not the reluctance of one acquainted with the narcotic trade. In fact, the inference is compelling that the hesitancy on petitioner's part was because of his lack of desire to engage in these activities.

Further evidence supporting the inference that petitioner reluctantly yielded to repeated requests to become involved in this criminal venture can be found in petitioner's own testimony. He stated that he had been introduced to Agent Crane through Ed Keegan. He also indicated that he at several times rejected the solicitations of Keegan's assistant, Gerald Williams and that he only agreed to become involved because he had been convinced that Keegan needed funds to stave off bankruptcy (3Tr. 243-14).

What the undisputed evidence shows it that petitioner was an industrious, innocent, law-abiding man with no previous disposition or intention to commit the offense; that the criminal design of committing the offense originated with the government officers; that the officers implanted in the mind of petitioner the disposition to commit the alleged offense for the purpose of prosecuting him for the commission of the crime and, by repeated, persistent and incessant solicitations, so induced him and succeeded in accomplishing their purpose. The foregoing is held in *Sorrells* v. *United States,* supra, to be entrapment.

It is respectfully submitted that as a matter of law petitioner was entrapped and accordingly, the judgment heretofore entered should be reversed, the sentence set aside, and a judgment be entered dismissing the case.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment of the Court of Appeals for the Third Circuit.

RAYMOND A. BROWN
Attorney for Petitioner

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APPENDIX A

Judgment Order of the United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 75-1830 & 75-1831

UNITED STATES OF AMERICA

v.

DION L. SANFORD
ROOSEVELT MCKITTY
ISAAC BRUCE BRAVO

Roosevelt McKitty,
Appellant in No. 75-1830

Isaac Bruce Bravo,
Appellant in No. 75-1831

(D. C. Crim. No. 74-366)

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Appendix A

Submitted under 3rd Cir. Rule 12(6) January 8, 1976

Before:

VAN DUSEN, ADAMS and WEIS,
Circuit Judges

Raymond M. Brown, Esq.,
Brown & Vogelman, Newark, New Jersey,
Attorneys for Appellants

Jonathan L. Goldstein, U. S. Attorney;
John J. Barry, Assistant U. S. Attorney;
Brian D. Burns, Assistant U. S. Attorney;
Newark, New Jersey,
Attorneys for Appellee

JUDGMENT ORDER

After consideration of defendants' respective contentions, namely:

(1) defendant McKitty was entrapped as a matter of law;[1] and

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[1] The evidence was sufficient to permit the jury to conclude that the defendant was predisposed to commit the crimes of which he was convicted. *United States* v. *Russell*, 411 U. S. 423 (1973); see, *e g.*, Trial Transcript, Vol. III, at 3.239-40; 3.251-54 (D. N. J., Crim. No. 74-366).

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(2) the evidence was insufficient to support a verdict of guilty against defendant Bravo;[2]

It is ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

BY THE COURT:

VAN DUSEN
Circuit Judge

Attest:

THOMAS F. QUINN
Clerk

Dated: January 14, 1976

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[2] The jury could reasonably infer from all the facts and circumstances surrounding the transaction, including the fact that Bravo looked into the crate, and from Bravo's subsequent flight, that defendant Bravo knowingly possessed marijuana with intent to distribute it in violation of 21 U. S. C. § 841(a)(1). See, *e. g.*, Trial Transcript, Vol. II at 2.28-30; 2.35; Vol. III at 3.158 (D. N. J., Crim. No. 74-366).

APPENDIX B

Statutory Provisions Involved

21 U.S.C. Section 841.

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute or dispense, a controlled substance.

21 U.S.C. Section 952.

(a) It shall be unlawful to import into the customs territory of the United States from any place outside thereof (but within the United States), or to import into the United States from any place outside thereof, any controlled substance in schedule I or II of subchapter I of this chapter, or any narcotic drug in schedule III, IV, or V of subchapter I of this chapter, except that—

(1) such amounts of any controlled substance in schedule I or II or any narcotic drug in schedule III, IV, or V that the Attorney General finds to be necessary to provide for the medical, scientific, or other legitimate needs of the United States.

21 U.S.C. Section 960.

(a) Any person who—

(1) contrary to section 952, 953, or 957, of this title, knowingly or intentionally imports or exports a controlled substance.

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(2) contrary to section 955 of this title, knowingly or intentionally brings or possesses on board a vessel, aircraft, or vehicle, a controlled substance, or

(3) contrary to section 959 of this title, manufactures or distributes a controlled substance, shall be punished as provided in subsection (b) of this section.

18 U.S.C. Section 2.

(a) Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whovere willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.